

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**MIAMI TRIBE OF OKLAHOMA,**

**Plaintiff,**

**v.**

**THE UNITED STATES OF AMERICA,  
et al.,**

**Defendants.**

**CIVIL ACTION**

**No. 02-2591-CM**

**MEMORANDUM AND ORDER**

This matter comes before the court on plaintiff's Motion to Reconsider and Relief from Order (Doc. 41). Plaintiff claims that the court erred in its February 18, 2004, Order by not recognizing jurisdiction under the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.* (APA), to review plaintiff's claims for equitable relief from the alleged wrongful agency action.

**I. Procedural Background**

On November 27, 2002, plaintiff filed the instant lawsuit seeking enforcement of a January 15, 1999, Stipulation and Agreement (Stipulation and Agreement) that settled prior litigation between plaintiff and the United States over the status of the Maria Christiana Reserve No. 35 (the Reserve) under the Indian Gaming Regulatory Act (the IGRA). Count I of plaintiff's complaint, entitled "APA, Injunctive Relief, and Violation of Stipulation," alleges that an October 31, 2002, opinion letter issued by the Office of the Solicitor, Department of the Interior (DOI) to the National Indian Gaming Commission (NIGC), which determined plaintiff did not possess jurisdiction over the Reserve for purposes of gaming under the IGRA,

violated the Stipulation and Agreement between the Tribe and the United States. Plaintiff also requested review under the APA of the Department of the Interior's (DOI) October 31, 2002, opinion letter, claiming that the DOI's opinion letter was an arbitrary and capricious determination. Count II of plaintiff's complaint, entitled "Equitable Relief and Accounting" alleges that defendants have repudiated the determination in the Stipulation and Agreement that the Reserve is Indian lands under the IGRA.

On March 28, 2003, defendants filed a motion to dismiss plaintiff's complaint for lack of subject matter jurisdiction and for failure to state a claim. In its February 18, 2004, Order ruling on defendants' motion to dismiss, the court found that the crux of both counts of plaintiff's complaint was its attempt to bind the United States to the terms of the Stipulation and Agreement and prevent the United States, its agencies and employees from taking any action contrary to the Stipulation and Agreement. *Miami Tribe of Okla. v. United States, et al.*, No. Civ. A. 02-2591-CM, 2004 WL 954501, at \*4 (D. Kan. Feb. 18, 2004).

The court further found that: 1) a suit against the federal government to compel performance of a contract requires the specific consent of the sovereign; 2) the government's waiver of sovereign immunity for claims seeking relief other than money damages pursuant to the APA does not extend to actions founded on a contract with the United States; 3) the only remedy to which the United States has consented in cases of breach of contract is to the payment of money damages under the Tucker Act, 28 U.S.C. §§ 1491(a)(1), 1346(a)(2); 4) federal courts do not have the power to order specific performance by the United States of its alleged contractual obligations; 5) the only remedy for such a claim would be monetary damages; 6) the Stipulation and Agreement, as a settlement agreement, constituted a contract for enforcement purposes; 7) claims against the United States based on an express or implied contract with the United States that exceed \$10,000.00 in amount come under the exclusive jurisdiction of the United States Court of Federal Claims

(Court of Federal Claims); and 8) in the absence of any claim for monetary damages in an amount under \$10,000.00, a district court must dismiss a breach of contract claim against the United States for lack of subject matter jurisdiction.

The court noted that plaintiff requests only equitable relief in the form of specific performance under the Stipulation and Agreement, but the only remedy available to plaintiff for its breach of contract claims against the United States, if any, is monetary damages. Because the court was unclear whether plaintiff intended to allege any monetary damages, the court denied defendants' motion to dismiss plaintiff's complaint, and gave plaintiff 20 days to amend its complaint to claim money damages under \$10,000.00 in amount. The court further noted that, if plaintiff amends its complaint to claim money damages over \$10,000.00, upon renewed motion from defendants, the court would dismiss plaintiff's complaint without prejudice in favor of its litigation in the Court of Federal Claims. *Id.* at \*4-5.

Plaintiff filed the current Motion to Reconsider and Relief from Order on February 28, 2004.<sup>1</sup>

## **II. Standard for Motion to Reconsider**

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<sup>1</sup>Notably, on March 7, 2004, plaintiff filed its first amended complaint, including Count I "APA and Injunctive Relief," Count II "Enforcement of Settlement - Equitable Relief," and Count III "Breach of Stipulation and Agreement and Misrepresentation" - which is a claim for monetary damages in excess of \$75,000.00. However, plaintiff noted in its reply brief in support of its Motion to Reconsider that it does not challenge the court's ruling with respect to jurisdiction over the monetary damages (Count III), and that it retained its equitable claim for injunctive relief enforcing the settlement (Count II) to preserve the issue for appeal. On April 30, 2004, the parties filed a stipulation of dismissal without prejudice of Count III of the first amended complaint, with plaintiff retaining its rights to file a complaint in the Court of Federal Claims. The same day, defendants filed a motion to dismiss plaintiff's first amended complaint for lack of jurisdiction. The court has not ruled on the pending motion to dismiss, as it has not been fully briefed by the parties.

Whether to grant or deny a motion for reconsideration is committed to the court's discretion.

*Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1332 (10<sup>th</sup> Cir. 1996); *Hancock v. City of Okla. City*, 857 F.2d 1394, 1395 (10<sup>th</sup> Cir. 1988). In exercising that discretion, courts have recognized three major grounds justifying reconsideration: (1) an intervening change in controlling law; (2) availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice. *See Major v. Benton*, 647 F.2d 110, 112 (10<sup>th</sup> Cir. 1981); *Burnett v. W. Res., Inc.*, 929 F. Supp. 1349, 1360 (D. Kan. 1996); *Marx v. Schnuck Mkts., Inc.*, 869 F. Supp. 895, 897 (D. Kan. 1994). "Appropriate circumstances for a motion to reconsider are where the court has obviously misapprehended a party's position or the facts or the law, or the court has mistakenly decided issues outside of those the parties presented for determination. A party's failure to present its strongest case in the first instance does not entitle it to a second chance in the form of a motion to reconsider." *Burnett*, 929 F. Supp. at 1360 (citing *Anderson v. United Auto Workers*, 738 F. Supp. 441, 442 (D. Kan. 1990); *Renfro v. City of Emporia, Kan.*, 732 F. Supp. 1116, 1117 (D. Kan. 1990)). Moreover, "[a] motion to reconsider is not a second chance for the losing party to make his strongest case or to dress up arguments that previously failed." *Flake v. Hoskins*, 55 F. Supp. 2d 1196, 1203-04 (D. Kan. 1999).

### **III. Discussion**

Plaintiff has requested the court reconsider its February 18, 2004, Order, under the third ground for reconsideration - the need to correct clear error or prevent manifest injustice. Plaintiff claims that the court erred by not recognizing jurisdiction under the APA to review plaintiff's claims for equitable relief from the allegedly wrongful agency action. Specifically, plaintiff claims that the DOI's October 31, 2002, opinion

letter was arbitrary and capricious, and that plaintiff's claim for review of the determination under the APA is independent of its contract claims.

**A. Characterization of Plaintiff's Claims as Breach of Contract Claims**

Plaintiff seeks to avoid being subjected to jurisdiction in the Court of Federal Claims by arguing that its challenge to the DOI's October 31, 2002, opinion letter, which determined plaintiff did not possess jurisdiction over the Reserve for purposes of gaming under the IGRA, is not an action arising under contract. Plaintiff argues that the issue over the opinion letter is a challenge of the DOI's allegedly illegal action as an agency action "ultra vires" of its authority, as arbitrary and capricious, and in violation of plaintiff's constitutional rights. Plaintiff claims it is entitled to equitable relief separate from any monetary damages it might seek in the Court of Federal Claims.

Despite plaintiff's argument that its claim for relief under the APA is independent of its claim that defendants violated the Stipulation and Agreement, the court still believes that the APA claim is simply another aspect of plaintiff's attempted enforcement of the Stipulation and Agreement. Plaintiff's characterization of its APA claim does not change the court's holding that the government's waiver of sovereign immunity for claims seeking relief other than money damages pursuant to the APA does not extend to actions founded on a contract with the United States. The court believes that plaintiff's appropriate remedy for its claims lies in the Court of Federal Claims, and that other relief is specifically prohibited by the Tucker Act.

The court rejects plaintiff's attempts to cast its contract dispute in different terms so that it might enjoy dual jurisdiction of the district court and the Court of Federal Claims and seek to compel the United States to specifically perform a contract, while also seeking payment of damages. *Ala. Rural Fire Ins. Co.*

v. *Naylor*, 530 F.2d 1221, 1229-30 (5<sup>th</sup> Cir. 1976); *Warner v. Cox*, 487 F.2d 1301, 1304 (5<sup>th</sup> Cir. 1974). The fact that the Court of Federal Claims cannot provide plaintiff the equitable relief it has requested is not grounds for denying the Court of Federal Claims' jurisdiction over the claim. *Am. Sci. and Eng'g, Inc. v. Califano, et al.*, 571 F.2d 58, 61-62 (1<sup>st</sup> Cir. 1978). Moreover, the APA cannot be used to obtain directly the injunctive or declaratory relief for a breach of contract that the Court of Federal Claims could not provide. *Int'l Eng'g Co., Div. of A-T-O, Inc. v. Richardson*, 512 F.2d 573, 580-81 (U.S. App. D.C. 1975). The court thus denies plaintiff's Motion for Reconsideration on that ground. However, that being said, the court believes it is important to address plaintiff's arguments regarding the merits of its APA claim.

#### **B. Relief Under the APA**

Plaintiff alleges that its independent claim for equitable relief under the APA overcomes defendants' sovereign immunity. Under the judicial review provisions of the APA, "agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. First, as noted above, the court believes plaintiff has an adequate remedy for its claim in the Court of Federal Claims. Second, however, to sustain such a claim directly under the APA, plaintiff must challenge a final agency action. *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 549 (10<sup>th</sup> Cir. 2001). Plaintiff contends that the DOI's October 31, 2002, opinion letter constitutes a final agency action that deprived plaintiff of its constitutional rights and that the issue is ripe for review by the district court. Plaintiff compares the current case to Judge VanBebber's opinion in *State ex rel. Graves v. United States*, 86 F. Supp. 2d 1094 (D. Kan. 2000) (*Miami III*).

In *Miami III*, the State of Kansas (the State) sought review of the DOI's November 10, 1998, determination (issued in an opinion letter to the NIGC) that the Reserve was Indian land. However, the

State sought review of the determination not only after the DOI issued an opinion letter to the NIGC regarding the status of the land, but also after the NIGC adopted the DOI's determination and approved a class II gaming management contract between plaintiff and Butler National Service Corporation. Notably, the State named as defendants not only the United States and agents of the Office of the Solicitor, but also agents of the Bureau of Indian Affairs and the National Indian Gaming Commission. In concluding that the State was entitled to judicial review of the determination, Judge VanBebber stated that the "federal defendants' agency determination that the Reserve qualifies as Indian land is reviewable. The National Indian Gaming Commission's approval of the management contract on January 7, 2000, is a final agency action reviewable pursuant to the Administrative Procedure Act." *Id.* at 1100.

The court believes that the circumstances in the present case are distinguishable from those present in *Miami III*. In this case, plaintiff has requested review only of the determination in the DOI's October 31, 2002, opinion letter. The October 31, 2002, opinion letter was written at the request of the NIGC for assistance in its determination of whether the Reserve constitutes Indian lands for purposes of gaming under the IGRA as part of its decision whether to approve or disapprove plaintiff's current gaming management contract. As of the filing of this Motion to Reconsider, the NIGC had not determined whether it would adopt the DOI's determination, and has neither approved nor disapproved plaintiff's gaming management contract. In fact, the court understands that the NIGC has solicited input from both plaintiff and the State regarding the status of the Reserve in conjunction with its own determination of whether the gaming management contract should be approved or disapproved and, at plaintiff's request, has considered holding a hearing prior to the NIGC taking any action on the gaming management contract.

The court finds that the October 31, 2002, opinion letter, by itself, is not final agency action reviewable under the APA. The purpose of the opinion letter is very specific - to assist the NIGC in its approval or disapproval of plaintiff's gaming management contract. Until the Chairman of the NIGC issues a decision on the gaming management contract, there is no appealable agency action. Even then, plaintiff would need to file an appeal of the Chairman's decision with the NIGC itself. Upon decision of the appeal by the NIGC (or absence of a decision within the time specified by the regulations), the decision becomes a final agency decision that is appealable in federal district court. 25 C.F.R. § 539.2; 25 U.S.C. § 2714. The court finds that, until the NIGC makes some final decision with regard to the gaming management contract, there is not a final agency action that would be ripe for review pursuant to the APA as was the case in *Miami III*. For this court to engage in review of the determination in the DOI's opinion letter at this point in the process would be premature and could very possibly impede the NIGC's final determination. Accordingly, even if the court considered plaintiff's APA claim independently of its breach of contract claims, plaintiff's claim for equitable relief under the APA is not based on a final agency action that is ripe for review at this time.

**IT IS THEREFORE ORDERED** that plaintiff's Motion to Reconsider (Doc. 41) is denied.

Dated this 8<sup>th</sup> day of June 2004, at Kansas City, Kansas.

s/ Carlos Murguia  
**CARLOS MURGUIA**  
**United States District Judge**



